

July 10. 1766.



A N S W E R S

F O R

CHARLES INGLIS Depute-Clerk of the Bills,

T O

The PETITION of Robert Waddel, one of the
Principal Clerks of the Bills.

AS this cause was lately the subject of your Lordships most mature consideration, it will not be necessary for the respondent to trouble your Lordships with a very minute recital of facts. He shall therefore only mention, in as few words as possible, those which seem most material.

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Before the 1685, this office of principal clerk was held by a single person. Sir George Mackenzie of Tarbat, then Lord Register, about that time thought of giving his son John Mackenzie the benefit of the one half of the office, by taking Mr Wedderburn of Blackness the principal clerk bound in a backbond, to account to him for the half of the emoluments. But soon after the Register changed his plan, and in consideration of a certain sum paid to him by Mr David Grame, for and in behalf of his son John Mackenzie, he granted a

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A commission

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Feb. 4. 1685. commission to Mr Græme to be conjunct clerk of the bills during all the days of his natural lifetime. Thus Mr Wedderburn and Mr Græme became conjunct principal clerks of the bills, and a letter was immediately procured from King Charles II. to your Lordships predecessors, declaring, that this appointment of two persons to the office of principal clerk, *was a good service* done by the Register, and approving of the commission to Mr Græme accordingly.

From that period, down to the present time, the office of principal clerk of the bills has been held by two persons conjunctly, though under separate commissions. The succession of these offices is particularly described in the 5th page of the petition; and it is sufficient here to observe, that the petitioner Mr Waddel succeeded in the office of one of the conjunct principal clerks in 1762, upon the resignation of Mr James Burns, who, in 1753, had succeeded upon the resignation of Mr David Anstruther.

What were the duties performed by the principal clerks while the office stood united in one person, cannot now be discovered after such a lapse of time; and although from the records of the signet-office it appears, that, before the 1710, the two conjunct principal clerks used sometimes to take the trouble of adhibiting their subscriptions to bills, probably for their amusement, yet every circumstance that can now be discovered, does abundantly declare, that the duties of this important office have almost constantly been discharged by deputies, one or more, of their appointment. Since that period of the 1710, it is proved and admitted, that the office of principal clerk has been held as an absolute *sinécure*, and that the deputies have been the sole acting officers, confided in by your Lordships, and employed by the lieges in the whole business of the office, and who accordingly have held and enjoyed fees and emoluments, distinct from and independent of those belonging to the principal clerks from whom they purchased their commissions.

From

From the earliest times, it appears that the principal clerks have been in use to appoint such deputies, commonly three in number, for officiating in different departments of the office; and from the time that the principal clerkship came to be vested in two persons, both these officers have uniformly concurred in the grants of each deputation; nor is there a single instance of one of those principal clerks separately granting a commission to a depute or deputies to act for or under him in his half of the office.

Further, it is remarkable, that all the commissions to deputies which can be discovered from the 1651, when Mungo Murray was appointed a depute, down to this day, bear to be given and granted for the endurance of the lifetimes of such deputies. At the same time, it is true, that such a deputation granted to Harry Oliphant became the subject of challenge, at the suit of a succeeding principal clerk in 1684; and that James Nicolson, another depute, though possessed of a commission for his own life, granted to him by Sir William Bruce as far back as the 1675, did, *ob majorem cautelam*, obtain from Sir James Anstruther and Sir Thomas Stewart, a ratification or renewal of his commission, upon their respective successions to the office, and so continued to act as depute down to the 1713. These ancient commissions to deputies during their lives appear from the case of Harry Oliphant recited in the petition; and the petitioner has not been able to point out so much as a single example of such a commission being granted for a shorter term or endurance.

In February 1713, Mr James Oliphant was appointed one of the depute-clerks for his lifetime; and his commission to that effect stands recorded in your Lordships books of sederunt, together with his admission to the office thereupon.

Mr Oliphant having soon after resigned, his resignation is also recorded in the same books; and thereupon Charles Inglis senior obtained a commission from Sir Alexander Anstruther of Newark, and Sir Philip Anstruther of Anstruther-
field, July 22. 1713.

field, conjunct principal clerks, whereby they " nominated,
 " constituted, and appointed the said Charles Inglis to be
 " their depute, for officiating under them; and their successors
 " in office, *during his lifetime*, in all bills of suspension and
 " advocacy to be given in at their office, and presented be-
 " fore the Lords of Session; and to receive the bonds of cau-
 " tionry, and uplift the ordinary dues of said bonds of cau-
 " tionry, and apply the same to his own use; and, generally,
 " to act and to do under the said Sir Alexander and Sir Phi-
 " lip Anstruthers, and their successors in the said office of
 " clerkship, in all and every thing as James Nicolson or Mr
 " James Oliphant, former deputies, were in use to do." The
 commission likewise bears an obligation on the granters, con-
 junctly and severally, and their heirs and successors, " That
 " the same should stand good and effectual to the said Charles
 " Inglis during all the days of his life, he behaving himself
 " himself as becomes." And the commission to Oliphant
 contains the like obligation.

This commission to the respondent's father, with his ad-
 mission thereupon, also stands recorded in your Lordships
 books of sederunt in the same year 1713.

The said Charles Inglis senior continued to hold and exe-
 cute his office of depute during many years, and while sever-
 al changes occurred in the office of principal clerk, without
 any challenge or objection. But, in the 1742, when he was
 far advanced in life, he became desirous of having his son the
 respondent, whom he had educated and trained up to the
 office, conjoined with him in it, and secured of the survi-
 vancy. Accordingly Sir Philip Anstruther of Balcaskie, and
 David Anstruther, Esq; then principal clerks, did, for very
 onerous considerations, of this date, grant a commission, re-
 citing the former one granted in the 1713 to Charles Inglis
 senior, and constituting and appointing the said Charles
 Inglis senior and the respondent, and the longest liver of
 them two, to be their deputies for officiating under them and
 their

June 2. & 4.
 1742.

their successors in office, in the precise terms of their former commission. At the same time Sir Philip and David Anstruthers granted an obligation to the respondent, binding themselves, in the event of Charles Inglis elder his predecease, to grant the respondent a new commission during all the days of his natural life.

From that period of the 1742, down to the present time, the respondent has given constant attendance upon the important duties of this office, both in the time of session and vacation. He has been so fortunate as to discharge the trust reposed in him, as he humbly hopes, with the approbation of your Lordships, and without complaint either from the principal clerks or the public: And by his education and long practice in this peculiar sphere, he has sequestered himself from application to all other business of a public or a private nature.

Some time after the respondent's father's death, Sir Philip and David Anstruthers, who still held the office of principal clerk, did concur in granting the respondent a new commission, reciting the former joint commission and obligation, and appointing the respondent, "during all the days of his natural life, to be depute-clerk for officiating under them and their successors in office," in the branches of duty specified in the former commissions; and bearing a clause of warrandice in the same terms with that contained in the commission granted to his father in the 1713. Neither this commission, nor the one granted to the respondent and his father in the 1742, were recorded in the books of sederunt, owing to these considerations, that his father's original commission being recorded, it was thought unnecessary to present the new one in the 1742, while his father was living and acting; and that the respondent having acted for several years under the eye of the court, before obtaining his last commission in the 1747, it was thought there was then no occasion for presenting it.

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It has been already observed, that Mr David Anstruther, one of the principal clerks, and one of the granters of the respondent's commission, having resigned in the 1753, was succeeded by Mr Burns, in pursuance of a transaction between them. Mr Burns held the office from the 1753 to the 1762; and was much disposed to have augmented the emoluments thence arising, by challenging the validity of the commissions granted by his predecessors to their deputies, particularly the respondent's. But upon the advice of very eminent counsel, he desisted from an attempt which he was told would in all probability prove vain and fruitless.

Upon Mr Burns's resignation in the 1762, the petitioner, Mr Waddel, was appointed his successor, in pursuance of a transaction between them; and Sir Philip Anstruther, the other principal clerk, having at the same time resigned, was succeeded by his son, now Sir Robert Anstruther of Balcaskie. The commissions to Sir Robert and the petitioner were expedited on the same day, and in the precise same terms.

The respondent may likewise be permitted to observe in general, that although the commissions of the principal clerks have, from the 1730, flowed from the crown; yet as the office has, as far back as the memory of man, been held and regarded as an absolute *sinecure*, so it has really and truly been the subject of commerce, and been transferred from one to another, in pursuance of private transactions, and bargains of sale, between the respective possessors of it.

However, the petitioner, Mr Waddel, though it cannot be denied that he came into the office in the manner above described, and when it is to be presumed he made proper inquiries respecting its situation, yet forthwith resolved to pursue measures unattempted by his predecessors, for turning out, if possible, the acting deputies, whence a considerable emolument might be expected, either by his acting personally, or by his having the sale of the new deputations.

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With this view, in summer 1764, he presented a petition to your Lordships, in the name of himself and of Sir Robert Anstruther; the tendency whereof was, to remove the respondent *brevi manu* from the possession of an office that he had held and exercised for above twenty years, under a commission granted to him for life. Neither law nor justice would permit that the respondent should, in this summary way, be subjected to the trial of his freehold; and therefore your Lordships "found the petition not competent," and dismissed the same; July 24. 1764. reserving to the petitioners to insist against the respondent in a declarator or a reduction, and reserving to the respondent his defences against the same, as accords.

Mr Waddel accordingly brought an action at his own instance singly against the respondent, concluding, *1mo*, To have the respondent's commission reduced, in respect that the granters had no power of appointing any deputy, to continue in office longer than their own lives: And, *2do*, To have it declared, that, notwithstanding thereof, Mr Waddel is intitled to officiate in every branch of the business in the bill-chamber.

This action came before the Lord Auchinleck as Ordinary, and the petitioner has hitherto insisted only upon the reduction, or first branch of his libel. After sundry proceedings, which were stated in the informations, and need not be here resumed, the Lord Ordinary reported the cause; and your Lordships, on the 18th of June last, were pleased to pronounce this interlocutor: *The Lords sustain the defences for Charles Inglis, and repel the reasons of reduction; and remit to the Ordinary to proceed accordingly.*

Against this interlocutor Mr Waddel now reclaims; and his petition is drawn with great ability. But as the judgment proceeded on grounds the most solid and perspicuous, the respondent flatters himself, that he will be able to satisfy your Lordships, that the petition ought to be refused, and the interlocutor adhered to.

Ass

As the respondent's defences resolved into two branches, an objection to the petitioner's title, and an argument in support of the validity of his commission, he apprehends, that, in point of order, the objection to the title falls regularly to be first considered, although the petitioner has been pleased to treat it in the last place.

The objection to the petitioner's title rests upon a twofold ground: 1st, That as the petitioner is but one of two conjunct clerks, he cannot, without the concurrence of his colleague, carry on an action for reducing the commission of a depute, flowing from the joint act and deed of two conjunct principal clerks: And, 2^{dly}, That the petitioner having acquired this office by transaction with Mr Burns, when he knew that the respondent held a députation for life, bearing the absolute warrantice of the granters, he is not *in bona fide* to insist in any challenge of it.

With regard to the first of these points, your Lordships will observe, that the petitioner is by his commission appointed *clericum conjunctum tabula petitionum*; and that the like are the terms of Sir Robert Anstruther's commission. One and the same office is therefore granted to them, *jointly and indivisibly*, and not a separate office to each distinctly. But at present, so far is Sir Robert Anstruther from concurring in this action with the petitioner, that he has appeared by his counsel, and declared, that he concurs with the respondent in supporting his commission, and opposing the pursuer's attempt to reduce it. It matters not what are the considerations which move Sir Robert thus to espouse the respondent's cause, or whether it proceeds from his apprehending, that he might become liable in the warrantice which his father Sir Philip granted to the respondent, should his commission be reduced; for still the consequence is the same, whatever may be the motive that influences Sir Robert to oppose his colleague in this matter.

The respondent did, in his information, submit to your Lordships his reasons why he apprehended, that, in general, when

when an office or trust is granted to two or more persons jointly, they must all concur in every act of administration. This undoubtedly is the case in tutory, which often flows from the King's nomination. In reason it seems to hold, that when two or more are jointly authorised to discharge a particular duty, all must concur to render effectual what is done; or at least, that when they are equally divided upon any measure, the will of the one must balance that of the other; and the rule must in such case apply, *Melior est conditio prohibentis*.

But, further, as the respondent derived his power and commission from the two clerks jointly, as he was lawfully vested with this office by the joint act and deed of the two principal clerks for the time, it evidently follows, that nothing less than their joint concurrence can be sufficient for removing him from it.

The petitioner has answered to this, *imo*, That each of the clerks has a distinct right from the crown to one half of the office; which he can therefore exercise by himself and deputies, without the concurrence of the other. And, *2do*, That whatever might be the case as to one clerk's challenging a deputation, while another clerk who had concurred in granting it is living; yet here both the granters being dead, the respondent is to be held as having no commission; and consequently to be regarded as an intruder into the office, who may be removed by either of the clerks at pleasure.

But in reply to the first point, it is submitted, that the petitioner has not a right to the one half of the office as a divided subject, but a *joint right* to the whole along with another. The whole office is vested *jointly* in the two, although the profits and emoluments arising to each of them are known and distinct. The respondent therefore apprehends, that he might well maintain, that their commissions do not intitle them to act separately in any branch of the office: but whatever regulation between them might obtain, for the more convenient discharge of the services they owe to your Lordships

and the public, were they to officiate personally; such as their acting *per vices*, as they are said to have anciently done; yet the case is widely different with regard to matters respecting the office itself, and the internal concerns of it; such as the appointing and removing deputes and under officers, the custody of the writings, &c.

In these matters, the office is to be considered on the same footing with a common property to which two persons have a joint and undivided right. These two proprietors may have separate charters, and derive their rights from different authors; yet both must concur in what respects the common subject. Hence, as a possessor of such subject cannot remove from the interest of the one without removing from that of the other; so, unless both proprietors join in the removing, the possessor is intitled to hold the possession of the whole, agreeable to what is laid down by our lawyers of the greatest authority, and in sundry of your Lordships decisions.

Hope's Minor
Præctics,
tit. 13. § 34.
Stair, lib. 2.
tit. 9. § 43.
Bankton,
lib. 2. tit. 9.
§ 62.

That the same principle has been considered to apply to the office in question, is manifest from the conduct of the principal clerks themselves, from the earliest times to the present. No instance can be given of a separate deputation being granted by any one of the principal clerks for the time; but in all such commissions, both have uniformly concurred. The custom has been to have three deputes, to each of whom an entire branch of the office was allotted; whereas, if each of the principal clerks had been thought to have the power of naming deputes for their own share, there would have been six deputes, two for each branch; which never was the case, and which would necessarily occasion infinite confusion.

It being thus plain, that both the principal clerks have acted jointly in the nomination of deputes, it must follow, that the concurrence of both must be requisite for the removing a depute. The respondent cannot be removed from the one half of his office; and therefore he must hold the whole until both the principal clerks concur in removing him. Neither

ther is there any reason to apprehend the danger which the petitioner suggests, of one of the principals colluding with a depute to defraud the other, or otherwise abuse his trust: for the fees of the principals are distinct, and separately upliftable by them; and if the depute commits malversation, or breach of duty, relief can be had from your Lordships.

Again, as to the circumstance of both the granters of the respondent's commission being dead, whence it is said he is to be regarded as an intruder, having no commission, your Lordships will observe, that this proceeds upon a *petitio principii*, that the respondent's commission expired with the life of the granters. This is denied by him; and in a question as to the petitioner's title to insist in a reduction of it, the respondent's commission falls to be considered as good and sufficient while unreduced. The very nature of the action supposes it to be so; and *ex facie* of the commission, the respondent is intitled to hold his office during his own life. However therefore the petitioner's argument might aid him, were he insisting in a declarator of his right to remove the respondent as an intruder having no commission, it cannot support his title to insist in the present shape, for reducing a commission that is *ex facie* good and subsisting until reduced.

So much with respect to the first branch of the respondent's objection to the petitioner's title. And as to the other preliminary objection, namely, That the petitioner is not *in bona fide* to insist in this action, the respondent apprehends, that it is founded in reason and material justice, and well merits to be regarded by your Lordships accordingly.

The respondent must here beg pardon for observing, that the petitioner seems to have misapprehended the considerations that occurred to your Lordships on this head, and, it is believed, had some influence on the judgment pronounced. The respondent humbly apprehends, that your Lordships did not enter upon any question respecting the consequences of the warrandice contained in the respondent's commission, or
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how far the granters, or their successors in office, could be thereby affected. Your Lordships had not parties before you for trying such questions, nor do they at all coincide with the nature of the present action. Your Lordships have considered the conduct of the petitioner, and the circumstances under which he has brought this action, as solely applicable to the determination of it, and not to the interest of third parties.

It is doubtless a circumstance of the greatest weight and importance in the present cause, that the petitioner did not obtain a grant of his office of principal clerk, merely through the gracious act of the crown, and when ignorant of the nature and situation of the office, or unconnected with the person who formerly held it. He has not, nor cannot deny, that he bargained with his predecessor Mr Burns, and that in pursuance of such bargain Mr Burns resigned, and the commission was obtained by the petitioner. As this is the fact, it must be presumed that the petitioner inquired into the situation of the office, and learned that the respondent was possessed of a deputation for life, and that Sir Philip and Sir Robert Anstruthers stood bound in warrandice of it. That Mr Burns knew of such a deputation, that it was for life, and purchased for a valuable consideration, and that the other clerks in the office held their commissions upon the same footing, could be clearly proved, if controverted. The respondent begs leave to inform your Lordships, that Mr Burns himself was the writer of a like commission granted by Sir Philip and Mr David Anstruthers to William Scot, another of the deputed, in the 1749, recently before he himself became principal clerk, and he knew what Mr Scot paid for it. Mr Burns too, when become clerk, concurred with Sir Philip Anstruther in granting a life-commission to Laurence Inglis, another of the deputed, and received a suitable gratification for it. It cannot therefore be doubted, that in the course of the transaction between Mr Burns and the petitioner, Mr Burns would acquaint him

him of the footing on which these deputations stood; especially as it is notorious that a considerable part of the emoluments of the principal clerkship has always arisen from the sale of such deputations.

Under these circumstances it is evident that the petitioner transacted for and acquired his office with his eyes open, and in the knowledge of the nature of the respondent's commission. He acquired it *tantum et tale*, as it stood in the person of Burns, and of Burns's predecessor David Anstruther; and therefore, although it may be true that he came under no express obligation or backbond to Burns or Anstruther, not to challenge the respondent's commission; yet he came under an implied obligation not to do so, since he does not shew that the right of challenge was meant to be reserved to him. It is indeed impossible to suppose that Mr Anstruther and Mr Burns could by such transactions intend to leave themselves liable to incur the warrandice of commissions granted by them in the event of the petitioner's bringing a challenge of them.

On these grounds it is apprehended that the petitioner is *in mala fide* to insist in this action, after acquiring his office by bargain, *tantum et tale* as it stood in the persons of his predecessors, and when, in consideration of the subsisting deputations, he must be presumed to have acquired it at an easier rate. This is the import of the objection which the respondent apprehends had weight with your Lordships as a separate ground for hindering the petitioner to proceed in this action, and which he humbly hopes will have its due weight.

The respondent comes now to consider the merits of the cause, or the validity of his commission, supposing the petitioner to have a sufficient title to bring it under challenge.

The respondent apprehends that his office is his freehold, which he is intitled to enjoy during his life; that the principal clerks from whom he received it, had full powers, as explained by usage and custom, to grant him a commission for
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his lifetime ; and that it is not in the power of the two present principal clerks even jointly to deprive him of it.

Your Lordships have already heard upon what ground the respondent holds, that a deputation for life may be legally and effectually granted, though no power of that kind is specified in the principal clerks commission from the crown. There is nothing in their commission prohibiting their granting such deputation ; and the constant and uniform usage of giving such deputations for life, for about a century past, and these acknowledged to have been allowed full effect, without challenge, or regular ratification of succeeding principal clerks, or these principal clerks so much as acting since the 1710 or 1713, is sufficient to declare the power of giving such deputations to be legally vested and confirmed.

The respondent must here observe, that the petitioner seems in some measure to mistake the state of the question now under your Lordships consideration. He says, That his commission from the crown intitles him to act by himself, and deposes to be named by him, and for whom he shall be answerable ; and that the respondent's plea tends to exclude him and his deposes altogether.

The respondent imagines, that the petitioner's commission would not go so far as to make him liable for deposes named by his predecessor. The words do certainly bind him only to answer for deposes of his own nomination ; and could they bear his construction, still he could run no risk. The respondent has acted faithfully hitherto ; and should he deviate from the proper path, your Lordships could remove him upon the petitioner's complaint. But it is plain, that your Lordships have not yet found, that the respondent is intitled to exclude from the office altogether, as the petitioner says, a person authorised by his sovereign to act. You have only sustained the respondent's commission ; but the question is still entire, Whether the petitioner, or deposes named by him, may, or may not, act in conjunction with the

the respondent, or in other departments of the office distinct from his ?

The respondent too has no occasion to controvert the justness of the general principles of law appealed to by the petitioner, That *resoluto jure dantis resolvitur jus accipientis*, &c. These principles may justly govern the decision of cases where no specialities occur to take off their application. But reason suggests, that there must be many exceptions from such general rules; and the petitioner himself acknowledges that there are such.

The petitioner indeed is pleased to say, That in all cases where a deviation from these rules has been allowed as to a principal and his depute, the special authority of the legislature, or of the crown, has been required to that effect. And he gives several examples of this kind; such as in the establishment of keeper of the register of seifins, the appointment of the Justice-Clerk's deputies, and the depute commissary clerks.

The respondent, however, cannot admit, that nothing less than the special authority of the legislature, or the crown, can dispense with those rules in such cases as the present. Such authority may, in some cases, be properly used; but this cannot prove, that nothing else will suffice. On the contrary, the respondent holds it, upon the authority of reason itself, of lawyers, of decisions, and of your Lordships opinion in the present case, that usage and expediency together, or even separately, are sufficient to establish such an exception; and that the very case of the officers referred to by the petitioner, as well as of several others, prove for the respondent's doctrine, that usage alone can sufficiently establish the powers of a public officer to appoint inferior officers, though not specially authorised so to do by the tenor of his commission.

With regard to the register of seifins, which the act 1617 authorises the clerk-register to put under the care of particular deputies *for all the days of their lifetime*, it is to be considered,

dered, that the statute established a new office, wherein no usage could have obtained to explain the power of the register in granting life-ent-commissions. The legislature did therefore properly declare such power to be in the Lord Register, to prevent all doubt concerning it; and in doing so, it declared the justness of the principle which the respondent here contends for, namely, That the acting officer, discharging the duty of an office requiring fidelity and attention, whether such officer has the name of a principal or depute, ought to be established for life.

As to the Lord Justice-Clerk, his power of nominating the clerks of justiciary is extremely apposite to the present case. The title of that high officer denotes, that though now the President of a supreme court, his predecessors have been originally the clerks of it: So this seems to be confirmed by the tenor of the commissions of the principal clerk of justiciary, who is designed, *Depute-Clerk under the Lord Justice-Clerk*. The petitioner indeed says, That his Lordship's power of naming these deputies for life flows from an express grant of the crown. But this is not entirely the case. The respondent can affirm, upon the authority of the books of adjournal, that the commissions to the Lords Justice-Clerk, either ancient or modern, do not contain a special power of naming the clerk of justiciary; and that nevertheless, from the 1626 downwards, they were in use of appointing one depute-clerk of justiciary during the life of such depute.

But about the time of the revolution, the crown interfered in that nomination, particularly by appointing Thomas Gordon to the office. This occasioned, in the 1694, a letter from K. William and Q. Mary to the chancellor and privy council, mentioning, "That their Majesties having named
" Adam Cockburn to be Justice-Clerk; and they understand-
" ing, *that it was always the right and privilege* of the Ju-
" stice-Clerk to have the naming *deputes, one or more, in the*
" *said office*, and of all clerks to justice-courts, until of late,
" that

“ that innovations were made in favour of Mr Thomas Gordon, in prejudice of the right of the said office; and their Majesties being willing to confer a mark of their favour, by restoring the place to its rights and privileges in his person,” therefore they signified their pleasure, that the Justice-Clerk should have the nomination of all the clerks of justiciary : which he has accordingly ever since enjoyed. This letter is recorded in the books of adjournal 21st April 1694; and, joined with the former practice, clearly proves, that the right of the Justice-Clerk to grant deputations during the lives of the deutes, was originally derived from usage alone.

Again, the commissary-clerks, ever since the 1706, have indeed had a special power by their commissions of appointing a depute for life ; but before that period, they had only a general power to appoint deutes, for whom they should be answerable, as appears from the commission of William Nairn, 5th January 1705. Yet before that period, they were in use to grant commissions to deutes for life ; and particularly Thomas Mercer was so appointed, and continued to enjoy his office till the day of his death, without any challenge. This shews, that the power was originally derived from usage, and that it was only expressed in the later commissions of the principal clerks, to remove all doubt concerning it.

The same perhaps has been the case as to the clerk-register, though the respondent has not access to know it with certainty. At the same time, that officer being removable at pleasure, might make it seem the more requisite to give him a special power of naming under-officers for life. But, as already observed, instances of such special authority being given, can never derogate from this principle, that the like power may be vested and declared by usage.

In fine, no point of law whatever is more clear or better established, than that usage and custom will ascertain and establish the powers of a public officer beyond what is expressed in his commission. It is therefore of no moment, that the com-

missions granted to the principal clerks to the bills, whether by the Lord Register or by the crown, did not confer upon them the special power of granting deputations during the lives of the deutes. It is enough that it appears the commissions were uniformly granted to these deutes for their own lives, and that the offices were enjoyed by them accordingly, even after the death of the granters.

That usage can support the effect of such commissions to deutes, the respondent apprehends, is not only proved by the instances already given, but also by the cases of the clerks of session, and of the Lyon clerk. It has been admitted, that the principal clerks of session have no power by their commissions to appoint deutes; and yet that they constantly grant commissions to the under-clerks for life, which have never been thought liable to challenge. The Lord Lyon's commission only impowers him to name officers of court; and yet your Lordships determined, that a commission granted by the Lord Lyon to Mr Erskine to be Lyon clerk for life, was effectual after the death of the granter; and he accordingly enjoys it at this day. This decision proceeded on the usage explanatory of the inherent powers of the Lord Lyon.

Dict of decisions, vol. 2.
p. 291.

It has indeed been said, that there is room for a distinction between the case of one officer having the right to nominate another officer, whose functions are distinct from those of his constituent, and an officer's granting a deputation for the exercise of his own proper office, beyond the time that he himself is intitled to hold it; for that this last has the resemblance of the granting a reversion of his office, to take effect when he himself is removed.

The respondent might admit so much force in this distinction, that either an express power, or very strong usage, must be requisite to support deputations beyond the incumbency of the granter, where the deute does not hold an office in any shape distinct from the principal, but truly occupies and discharges the office of the principal allenary. But that is not the case at present: the deute clerk of the bills holds an office distinct from the principal

principal clerk ; he has distinct fees and perquisites ; his commissions have been recorded by your Lordships ; and he is declared, by act of sederunt, a member of the College of Justice, as well as the principal clerks. Indeed the office of depute is much the more important of the two, since that of the principal has confessedly become a mere *sinecure*. The depute-clerk of the bills is therefore to be regarded as upon the same footing with the depute-clerks of session ; and consequently the decision in the case of the Lyon clerk is in point to the present : for if usage can give an officer the right of appointing other officers for life, it is the same thing whether such other officers bear the name of deputies, or any other appellation, if the office is actually distinct from that of the granter.

The respondent therefore apprehends, that usage alone would be sufficient to determine this question in his favour, but it still must acquire additional force, when the strongest motives of expediency coincide in support of it. The petitioner is pleased to treat this consideration of expediency as of no weight whatever : he supposes the consequence of your Lordships interlocutor to be the declaring the principal clerkship for ever a *sinecure* ; and concludes, that there can be no expediency in excluding the principal clerks from acting, who are appointed by the crown for life, and substituting deputies for life in their room.

The respondent, on the other hand, does not mean to argue, that in every case whatever, reasons of expediency are to get the better of the rules of law ; but he apprehends, that expediency will be properly admitted to soften the application of those rules in particular cases, especially where the interest of the public is concerned. *A fortiori* will expediency be regarded when it is proved, as in the present case, that usage and practice has established a legal power in the granters of the commission in question. Were this point doubtful, expediency would be still sufficient to cast the balance.

Now, that it is the interest of society that offices should be well execute, cannot be denied. In order thereto, it is evidently requisite,

requisite, that every man who enjoys an office of trust, should, if possible, have a lease of such office during his life. Hence, where clerks, instead of drawing the dues of *sinécures*, like the principal clerks of the bills, are accustomed to officiate in a particular office, like the deputes, such clerks ought to have permanency in office. It is expedient, that every clerk, who has received education in a particular manner suited to the office he enjoys, should not be in danger of dismissal while he does his duty, either by the principal clerk, or even by the crown itself.

The constitution of this country is happily now very different from what it was fourscore years ago, when even judges were named during pleasure. It cannot, therefore, be surprising, that our supreme court should in those days have been a little doubtful as to departing from strict rules of law in questions of this kind, as seems to have been the case at the time of Oliphant's decision in 1684; but in later times, when the ideas of liberty, and public utility, came to be enlarged, juster principles have come to be adopted, and been made the ground of decisions.

Thus the magistrates of Montrose, who are patrons of the school, and pay the master's salary, having appointed Robert Strachan to be schoolmaster, without mentioning in their act that he was appointed for life, they, by a subsequent act, deprived him of the office. Strachan pleaded, in a suspension, That the nature of his office was such, that he could not be arbitrarily removed; but was intitled to hold it *quodmodum se bene gesserit*: and your Lordships accordingly so found, 27th January 1710, observed by Forbes. A similar decision was pronounced by your Lordships much later, in the case of the kirk-sessions of Glasgow, 27th July 1756, Harvie *contra* Bogle.

If reasons of expediency were thus allowed to maintain a schoolmaster or session-clerk in his office, much more ought they to support the possessor of such an important office as that of the clerk to the bills, seeing there are few who receive an education for the latter, but many for the former. And

as to the petitioner's argument, That the supporting the depute for life, must be in effect destroying the principal; it has been already observed, that your Lordships have not yet determined, that the depute is intitled to exclude the principal from acting. But should that prove ultimately the consequence as to the petitioner and respondent, it could not affect succeeding clerks; who may, in concert, alter the management of the office: and, at any rate, the principal could be in no worse condition than he and his predecessors have voluntarily put themselves, by converting their office into a *fine-cure*.

But leaving the general argument as to the points of usage and expediency, the petitioner has proceeded to attack the sufficiency of the usage and possession pleaded in the present case, *1mo*, As clandestine; *2do*, As interrupted; *3tio*, As such, that, in the apprehension of the respondent and his predecessors, derived no right to them; and, *4to*, As during a time when there was no opportunity to challenge.

More particularly, with respect to the first proposition, "That the usage and possession was clandestine," the petitioner has pleaded, as in the right of the crown, That the crown had not access to know of the deputations having been granted for the lives of the deutes; that their commissions did not appear in any public register; nor could the crown discover that the deutes continued to act after the death or removal of their constituents.

But to this it is answered, That your Lordships were of opinion, that the crown has no interest whatever in this question, nor can be affected by any judgment given in it. It is only a question between the principal clerk and the depute; and does, in reality, resolve into this, Whether the principal clerk is to put the money arising from the sale of the deputy's commission into his own pocket now, or at the death of the respondent? Taking it in this just view, the petitioner cannot

not avail himself of the plea, That the crown cannot be hurt by the neglect of its officers. The petitioner is in the same case with any of the crown's vassals disputing about a right of property held of the crown, and where the neglect or acquiescence of the private party must certainly affect him.

There is no law that requires the deposes in this office to register their commissions like instruments of seisin, or to make any intimation to the crown, or succeeding principal clerks, in order to render them effectual. It was the duty of the principal clerks to inquire into the nature of the deposes commissions: And your Lordships cannot doubt that they did so, considering the way their office has been transmitted for near a century past. Besides, your Lordships see, that Mr James Oliphant's commission, as depute for life, and also the respondent's father's commission, as far back as the 1713, were actually recorded in the books of sederunt, and these deposes admitted by your Lordships; which was a sufficient notification to all succeeding principal clerks, had it been necessary, as it was not. And as to what is observed in the petition to have been done by Mr Leith, when appointed assistant clerk of justiciary, perhaps it was proper, as the office was then newly created. But whatever he thought fit to do, it can afford no rule for the respondent, who holds an ancient and established office.

2^{do}, For proving that the usage and possession was interrupted, the petitioner appeals to the question between Mr Wedderburn and Harry Oliphant, decided in the 1684; and to the action raised at the instance of Lord Marchmont, then clerk-register, in the 1728.

But with respect to Oliphant's case, your Lordships have the proceedings fully stated in the petition; and from thence it is manifest, that your Lordships predecessors did by no means find, as the petitioner insinuates, that Oliphant's commission was to subsist only during the lifetime of William Bruce, who granted it. The court only found, that Sir William's

ham's demission could not prejudice Mr Oliphant; and that Mr Wedderburn, Sir William's successor, could not challenge Oliphant's commission during Sir William's lifetime. This was sufficient *ad victoriam causæ*; and did not import, that upon Sir William's death Oliphant's commission was to fall. Instead of so finding, the court seems purposely to have avoided the determination of that point. And even if they had determined it in that way, the usage since the 1684, or even since the 1713, of the principal clerks granting life-rent commissions to their deputies, would be sufficient entirely to remove the force of that decision, and to establish the office on a different footing.

Again, as to the action at the Earl of Marchmont's instance, in the 1728, it was brought against Sir Alexander Anstruther, and his deputies, chiefly upon this ground, That Sir Alexander had forfeited his office by being guilty of high treason, and stood committed to the Tower for counterfeiting the King's coin. The other branch of the libel, as to his having granted commissions to deputies for life, seems to have been the operation of the writer of the summons; and nothing further proceeded upon it than a decret in absence, which was immediately stopped by a representation, appointed to be answered; but to which no answers ever were made.

An action thus abandoned in its infancy can surely be of no avail to the petitioner. Were the respondent here acquiring any right by prescription, he might admit that such an action would interrupt it: but that is quite foreign to the present case. The respondent is acquiring nothing by prescription; on the contrary, he contends, that his commission was as good the day it was granted as it is still. He only pleads upon usage and custom, as declaratory of the powers of his constituent to grant such commission; and when such usage has been uniform, no action can affect the question, when no judgment has been given upon it. The uniform

usage was still continued; and must presume that these powers in the principal clerks were coeval with the office.

3^{tio}. For shewing that the respondent and his predecessors considered themselves as possessed of no life-right in virtue of that usage, the petitioner mentions, That James Nicolson, who was depute from the 1673 to the 1713, got his commission renewed by succeeding principal clerks: That Harry Oliphant's right was found to be confined to the life of the granter, by the decision 1684; and that the respondent's father and himself took their constituents bound in warrandice; which is said to import an admission of the lameness of their constituents title.

But with respect to Nicolson, his original commission appears to have been for life; and his taking a renewal of it from succeeding clerks was *ex superabundante*; and may have proceeded from an over anxiety, in the same manner as the condition in Mr Wedderburn's backbond to the Lord Register, that he should not quarrel Nicolson's commission. Besides, the usage since that period is clearly sufficient for the respondent's purpose.

Again, the decision in the case of Harry Oliphant has been already answered; and as to the warrandice in the respondent and his father's commissions, it was the same with that contained in the commission to James Oliphant their predecessor. As they both gave a very valuable consideration for their commissions, it was highly reasonable they should have the most absolute security for the enjoyment of them; and the granting of such warrandice, instead of indicating a sense of the lameness of the constituents title to grant such commissions, plainly shews, that the granters considered themselves as having good right so to do, since otherwise it cannot be imagined they would have willingly exposed themselves to the risk of incurring a warrandice, which eventually might have overbalanced the price got for the commissions.

Lastly,

Lastly, As to what is said, That the usage and possession has been during a time when there was no opportunity of challenge,

It is answered, *imo*, That this is not a case of prescription, to which the exception of *non valens agere* can apply. Besides, that exception is not understood to arise from impediments of the party's own creation, but from circumstances which he could not controul or avoid; whereas here the alleged impediment is said to have arisen chiefly from the voluntary deeds of the principal clerks in renewing commissions, or binding themselves in warrandice; which being truly an approbation of the usage, and having the effect to continue it, cannot now be founded on by the petitioner in prejudice of the respondent.

2do, The respondent's father's first commission was granted by Sir Philip Anstruther of Anstrutherfield and Sir Alexander Anstruther of Newark. Sir Philip died in the 1722; and his successor Sir Philip of Balcaskie nowise represented him, yet acquiesced in Mr Inglis's commission till his death, though under no backbond not to quarrel it, and though he did not renew that commission earlier than the 1742.

At any rate, after Sir Alexander's death in the 1740, to the 1742, when the new commission was granted to Mr Inglis, neither Sir Philip nor David Anstruther were under any restraint of that kind; for David Anstruther did nowise represent Sir Alexander, nor was under any backbond whatever; and the reason of Mr Inglis's taking a new commission in the 1742, was not to secure his own possession of the office, but his son the respondent's succession to him in it.

And, *3tio*, As during all the years in question, there were other two deputies in the office beside the respondent and his father, who had likewise commissions for life, so no reason has been assigned why the principal clerks might not have challenged these other commissions, had they not been
conscious,

conscious, that the usage and practice had established the validity of them.

Upon the whole, the respondent humbly hopes he has thus answered the petition to your Lordships satisfaction, which is indeed of the utmost consequence to him.

In respect whereof, &c.

DAV. RAE.